IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-10-0161

BNSF RAILWAY COMPANY,
Appellant/Petitioner

v.

CHAD CRINGLE and MONTANA DEPARTMENT OF LABOR, HUMAN RIGHTS COMMISSION
Appellee/Respondents

APPELLEE'S OPENING BRIEF

**ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY, HONORABLE JEFFREY M SHERLOCK
PRESIDING**

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I. STATEMENT OF ISSUE

Did either the Human Rights Commission (HRC) or the district court have authority to extend a 14-day deadline for appealing decisions made by a Department of Labor hearings officer when in mandatory language with no exceptions nor any provision for discretion, the legislature limited appeals to those filed within 14 days following issuance of notice of the hearing officer's decision, and provided that if no appeal was taken in that time, the hearing officer's decision is **final** and not appealable to the district court?

II. STATEMENT OF THE CASE

On July 7, 2008, Chad Cringle filed a complaint with the Montana Human Rights Bureau (HRB), charging that he had been discriminated against by BNSF Railway Company (BNSF), when after being conditionally offered employment as a track laborer and then satisfactorily meeting the conditions for employment, he was denied employment based solely on his height and weight and the unfounded perception, based on statistics rather than an individual evaluation, that he presented a risk of harm to himself or others. (DOL Doc. 7/7/08, pp. 1 and 2)

On January 23, 2009, following a finding of reasonable cause to believe that unlawful discrimination had occurred, the HRB forwarded the complaint to the Department of Labor (DOL) hearings officer for a contested case proceeding. (DOL Doc. 1/23/09)

On May 1, 2009, following discovery and briefing, the hearing officer awarded summary disposition on the issue of liability in favor of Cringle, noting that the issue had previously been decided in *Bilbruck v. BNSF Railway Co.*, H.R. Case No. 0031010549, 5/10/04, and that the only distinguishing factors in this case were that Cringle had been given the option of losing 10 percent of his body weight and re-applying without any guarantee of employment, or, in the alternative, undergoing thousands of dollars of additional medical tests at his own expense in violation of §39-2-301(1) MCA, also without any guarantee of employment. (Order Granting Summary Disposition, DOL Doc. 5/1/09, pp. 1 and 2) (Appendix 1)[1]

On September 2, 2009, the hearing officer's final decision was entered, awarding damages to Cringle caused by BNSF's illegal discrimination and enjoining BNSF, **for the third time**, from further similar acts of discrimination. (Hearing Officer's Decision, DOL Doc. 9/2/09, p. 19) (App. 2) On the same date, notice of the hearing officer's decision was issued and served on the parties. (Notice of Decision, DOL Doc. 9/2/09) (App. 3)

Twenty days later, on September 22, 2009, BNSF first attempted to file a

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[1] This identical issue was also previously decided by the hearing officer in *O'Dea v. Burlington Northern & Sante Fe Railway Co.*, H.R. Case No. 2091-2005 (8/11/06), and has since been decided unfavorably to BNSF in *Feit v. BNSF Railway Co.*, H.R. Case No. 475-2010 (3/10/10). (Feit actually lost the weight and had additional testing done to no avail.) Both *Bilbruck* and *O'Dea* were affirmed on appeal to this court. See *Bilbruck v. BNSF Railway Co.*, 2009 MT 216N, 2009 Mont. LEXIS 256 (June 23, 2009) and *Montana Department of Labor & Industry v. BNSF Railway Co.*, 2009 MT 262N, 2009 Mont. LEXIS 394 (Aug. 5, 2009).

notice of appeal from the hearing officer's decision along with a request for a one-day extension to file the notice of appeal[2]. (BNSF's Response in Opposition to Chad Cringle's Motion to Dismiss, Dist. Ct. Doc. 25, Exh. A and B) The request for extension indicated on page 5 that counsel for Cringle had not yet indicated whether he objected to the extension. However, counsel for Cringle did, in fact, object when contacted on September 22. He had not received a copy of the request for extension by September 25, 2009, and when contacted by the Human Rights Bureau on that day, advised the Bureau that Cringle did object based on the HRB's lack of jurisdiction or authority to entertain an untimely appeal. That objection was confirmed by letter dated September 28, 2009, and simply repeated what had been stated to BNSF counsel verbally. (Cringle Brief in Opposition to Motion for Stay, Dist. Ct. Doc. 4, Exh. 3, ¶¶ 3 and 4) (App. 4)

On October 5, 2009, the Commission issued its order pursuant to §49-2-505(4) MCA noting that BNSF's appeal was due by September 16, 2009, and was untimely, that an objection to the appeal had been lodged, and that for these reasons, the appeal was dismissed. (Cringle's Brief in Opposition to Motion to Stay, Dist. Ct. Doc. 5, Exh. 2) (App. 5)

On November 2, 2009, BNSF filed a Petition for Judicial Review or

[2] BNSF took the position that it was allowed an additional 3 days pursuant to Rule 6(e) M.R.Civ.P. However, Rule 6(e), by its terms is limited to situations where a time period runs from the date of service and service is by mail. Pursuant to §49-2-505, MCA, BNSF's appeal was due within 14 days of **issuance** of the hearing examiner's decision. Therefore, Rule 6(e) was inapplicable and the statutory requirement could not be extended by administrative rule.

Alternatively, Petition for Writ and/Declaratory Judgment in the district court for the 1st Judicial District in Lewis and Clark County, the Honorable Jeffrey Sherlock presiding. (Dist. Ct. Doc. 1) BNSF acknowledged that the hearing officer's decision and the notice of that decision were received at its counsel's office on September 3, 2009, but stated that it had been misfiled or otherwise misplaced and that, therefore, no notice of appeal was filed until September 22. (Doc. 1, ¶ 10) It acknowledged that on September 28, Cringle objected to the notice of appeal and the request for extension of time (Doc. 1, ¶ 11) and that on October 5, 2009, the Commission issued its order concluding that notice of appeal had been due by September 16, 2009. It contended that with three days for mailing, the appeal was actually due by September 21, 2009, pursuant to Rule 6, M.R.Civ.P., but acknowledged that it was still untimely (Doc. 1, ¶ 12). BNSF asked the court to conclude that the Commission had authority to extend the 14-day appeal period and order that the appeal was timely or that the Commission should be ordered to consider on the merits whether an extension should have been granted. (Doc. 1, ¶ 13)

On November 20, 2009, Cringle moved to dismiss BNSF's petition pursuant to Rule 12(b)(1) and (6) for lack of jurisdiction or in the alternative, because it failed to state a claim for which relief could be granted based on §49-2-504(4) MCA, which requires that appeals from a hearing officer decision be filed within

14 days from the date on which notice of the hearing is issued, and §49-2-505(3)(c) MCA, which provides that if the notice of appeal is not timely filed, the hearing officer decision becomes final and is not appealable to the district court. (Motion to Dismiss, Doc. 6.0 and Brief in Support, Doc. 9.0, p. 2)

On December 8, 2009, the State of Montana Department of Labor & Industry, Human Rights Department, (DOL) also moved to dismiss BNSF's appeal because it was not authorized pursuant to either §2-4-701 or 702 MCA of the Administrative Procedure Act, its administrative remedies had not been exhausted, the bases for an extraordinary writ were not present, and a declaratory judgment could only conclude that the Commission had properly followed the law. (Motion to Dismiss, Doc. 11, p. 3)

On December 11, 2009, the Department cross petitioned for enforcement of the hearing officer's final decision pursuant to §49-2-508 MCA (Doc. 16, p. 1) On December 16, Cringle likewise cross petitioned for enforcement and sought attorney fees pursuant to §§49-2-505(8) and 49-4-102 MCA. (Doc. 20, ¶¶ 4 and 5)

On December 14, 2009, the district court issued its order requiring that BNSF comply with the Department's September 2, 2009, decision, provided dates for compliance and gave BNSF an opportunity to appear on March 16, 2010, if compliance had not occurred and show why it had not obeyed a lawful order. (Doc. 17, pp. 1 and 2) Contrary to BNSF's assertion that the district court reached

the merits of the State's petition, the Court's order was in the nature of a show cause order.

In response to Cringle's cross petition, BNSF denied that its appeal to the Commission was untimely but admitted the remaining material allegations of the petition. (Doc. 22, ¶¶ 1-6)

On December 23, 2009, the court set all pending motions for hearing on February 25, 2010. (Doc. 26)

On December 31, BNSF asked the court to reconsider its order granting the Department's cross petition for enforcement, noted that all pending motions were set for February 25, 2010, and specifically requested that the cross petition be considered by the court at that hearing. (Doc. 30, p. 2) Presumably, that would have included Cringle's cross petition since the dispositive issues were the same. BNSF requested that the court consider its motion to stay and its own pending petition before ordering it to comply with the hearing officer's decision (Doc. 30, p. 2), and argued that it should be allowed to respond to the Department's petition and have the matter considered by the court along with its own petition at the February 25 hearing. (Doc. 30, p. 3) That is what occurred.

At the hearing held on February 25, 2010, BNSF counsel acknowledged that the court was there to hear all pending motions (Tr. 4:25-5:2). It was pointed out that if the railroad's petition is dismissed or denied, the next logical step is to

enforce the decision of the hearing officer which by definition was then final and for that reason, a proposed order to that effect was submitted. (Tr. 17:25-18:7) No objection was stated by BNSF to that assertion.

On March 15, 2010, the district court issued its order (Doc. 36) in which it dismissed BNSF's petition based on its conclusion that it lacked subject matter jurisdiction and it withdrew its December 14, 2009, order to enforce. (Doc. 36, p. 2) (App. 6) The court based its decision on Article VII, §4(2) Mont. Const., §49-2-505(3)(c) MCA (Doc. 36, p. 3) and this court's decisions in *Miller v. 18th Judicial Dist. Ct.*, 2007 MT 149, ¶ 44, 337 Mont. 488, 162 P.3d 121, and *Shoemaker v. Denke*, 2004 MT 11, ¶ 31, 319 Mont. 238, 84 P.3d 4. (Doc. 36, p. 4)

The district court concluded that because the Commission complied with the statutory provisions regarding appeals, it did not exceed its jurisdiction or abuse its discretion, that there was no basis for a special writ (Doc. 36, p. 4), and that the court's authority was similarly limited by the legislature's enactment of §49-2-5-505(3)(c).

On March 23, 2010, Chad Cringle filed a Motion for Relief Pursuant to Rule 60(b), M.R.Civ.P., pointing out that while the district court did not have authority to set aside the Commission's dismissal of the railroad's appeal, it did have authority pursuant to §49-2-508 MCA, to entertain the cross petitions for enforcement and pursuant to §§49-2-505(8) and 49-4-102 MCA, to award attorney

fees to the prevailing party in the administrative proceedings. (Doc. 39, pp. 4-6)

On March 29, 2010, the district court issued its nunc pro tunc order in which it concluded that because the hearing officer's decision was final pursuant to §49-2-505(3)(c), it may be enforced pursuant to §49-2-508 MCA, and that pursuant to §§49-2-505(8) and 49-4-102 MCA, the prevailing party is entitled to petition for attorney fees. Therefore, pursuant to Rule 60(b), the district court's March 16, 2010, order was amended to require that BNSF fully comply with the agency decision. (Doc. 43, p. 5) Cringle was ordered to submit an affidavit of attorney fees within 10 business days of the court's order and BNSF was given 5 business days within which to respond. (Doc. 43, p. 6)

In its March 29 nunc pro tunc order, the court specifically noted that BNSF had previously acknowledged in its motion for reconsideration that if its petition was denied, then enforcement would follow. (Doc. 43, p. 5)

The affidavit of counsel for Cringle in support of attorney fees and costs was filed on April 8, 2010, no response was filed by BNSF, and judgment was entered accordingly. (Doc. 49)

III. STATEMENT OF FACTS

The essential facts are set forth in Chad Cringle's Statement of the Case. The following additional facts are set forth in response to facts which are incorrectly asserted in BNSF's brief.

On p. 2 of its brief, BNSF suggests that Chad Cringle's claim was that he was discriminated against when he was asked for additional medical diagnostic information prior to employment as a track laborer. However, as can be seen from his complaint which is attached as Exh. A to BNSF's brief, that is not correct. Chad Cringle contended that he was discriminated against when after being conditionally offered employment as a track laborer, he satisfied the conditions by passing his physical examination and strength test, but the job offer was withdrawn anyway simply because of his height and weight. (BNSF's App. A, p. 1)

The hearing officer agreed. He found based on the uncontroverted facts that Chad Cringle successfully satisfied BNSF's conditions for employment, but in spite of that fact was told to lose 10 percent of his body weight and re-apply or have several thousand dollars worth of medical tests done at his own expense but that in neither event would employment be guaranteed. (App. 1, p. 2) He held that it was unlawful in Montana to deny an otherwise qualified job applicant employment because of concerns about a safety threat to that individual or others without an individualized assessment of the actual risk involved, and that pursuant to §39-2-301(1) it was illegal for an employer to require an applicant for employment to pay the costs of the medical examination required as a condition of hire. (App. 1, pp. 2-3) In response to BNSF's suggestion that it simply requested more information, the hearing officer found:

> "BNSF in this case tried to shift the cost of doing an individualized assessment to Cringle, the applicant, unless he lost weight and kept it off. In essence, BNSF required that Cringle either lose weight or provide an individualized assessment at his own expense. The former requirement assumed the fact that BNSF had to establish - through an individualized assessment – that this particular individual actually would be a direct safety threat if he were on the job without weight loss. The latter requirement ran afoul of a Montana law that forbids the employer from requiring medical testing at the applicant's expense as a condition of hire." (App. 1, p. 4)

BNSF's suggestion that Chad Cringle claimed to have been discriminated against simply because BNSF requested additional medical information mischaracterizes the entire nature of his claim and the hearing officer's decision. It also ignores the fact that he would not have been given the job he had previously been offered even if he had lost the weight and spent thousands of dollars of his own money for the additional tests.

On p. 5 of its Statement of Facts, BNSF argues that it was not requesting review of the hearing officer's decision and that Cringle's argument that it was doing so confused the district court. First, the sole objective of its appeal to the district court was to reverse the HRC so that it could appeal the hearing officer's decision. Therefore, it was appropriate for Cringle to point out that by unequivocal statutory language, the hearing officer's decision was final and could not be appealed. Second, there was no confusion by the district court. It clearly understood, as stated in its March 15, 2010, order (Doc. 36, p. 4), that because the HRC complied with the statutory limit on its authority to review the hearing

officer's decision, it neither exceeded its jurisdiction nor abused its discretion and that it could, therefore, not be ordered to ignore a mandatory deadline established by statute. (Doc. 36, p. 4) (App. 6) It concluded that the court's authority was similarly limited by the legislative enactment of §49-2-505(3)(c). The district court was not confused. It was correct.

On p. 6 of its Statement of Facts, BNSF suggests that on December 14, 2009, four days after the Department's cross petition and prior to any response from BNSF, the district court granted the Department's cross petition. In fact, what the district court did was order BNSF to comply with the form of relief ordered by the hearing officer on September 2, 2009, or appear on March 16, 2010, and show cause why it had not done so. In fact, no further enforcement action was taken by the Department or the district court until after the February 25, 2010, hearing at which BNSF, based on its own request, had an opportunity to argue why the Department's cross petition for enforcement should be denied. (BNSF's Brief in Support of its Motion for Reconsideration, Doc. 30, p. 2) Furthermore, the cross petition sought no different relief than had been previously ordered and affirmed by this Court on two previous occasions. Other than the appeal deadline, there wasn't anything to argue about.

On p. 7 of its Statement of Facts, BNSF states that it explained to the district court that if the 14-day filing period was not jurisdictional, it was subject to

modification, and the HRC erred in concluding otherwise. The inference being that it was one or the other and that the HRC and district court simply didn't understand. As the district court recognized when it cited to *Miller v. 18th Judicial Dist. Ct.*, 2007 MT 149, ¶ 44, 337 Mont. 488, 162 P.3d 121, even when not jurisdictional, time limits can be "categorical time prescriptions" which are "inflexible" or "rigid". Therefore, even if not jurisdictional, they are not subject to modification absent waiver or forfeiture by the consent of the other party, as will be discussed further in this brief.

IV. STANDARD OF REVIEW

The Montana Supreme Court reviews "for correctness" both an agency's conclusions of law and a district court's review of an administrative agency decision involving a conclusion of law. *N. Cheyenne Tribe v. Mont. Dept. of Envtl. Quality*, 2010 MT 111, ¶ 19, 356 Mont. 296, ___ P.3d ___. The court reviews a district court's determination regarding subject matter jurisdiction over a petition for judicial review for correctness. *Clouse v. Lewis & Clark County.*, 2008 MT 271, ¶ 23, 345 Mont. 208, 190 P.3d 1052.

However, in determining whether an agency correctly interpreted its own rules, procedures, or policies, an agency's interpretation should be afforded great weight, and a court should defer to that interpretation unless it is plainly inconsistent with the spirit of the rule. *Knowles v. State ex rel Lindeen*, 2009 MT

415, ¶ 22, 353 Mont. 507, 222 P.3d 595. To that end, an agency's interpretation of a rule will be sustained so long as it lies within the range of reasonable interpretation permitted by the wording. *Knowles,* ¶ 22. This standard is also employed when reviewing a district court's order affirming or reversing an agency's decision. *Knowles*, ¶ 23.

Nor does it matter if the district court placed too much reliance on its own lack of authority as opposed to the HRC's lack of authority to entertain BNSF's untimely appeal. "It is an axiom of Montana law that we will affirm a district court if it reaches the right result, even though its reasoning may not be entirely correct." *PPL Mont., LLC v. State,* 2010 MT 64, ¶ 112, 355 Mont. 402, 229 P.3d 421 (citing *Good Schs. Missoula, Inc. v. Missoula Co. Pub. Sch. Dist. No. 1*, 2008 MT 231, ¶ 24, 344 Mont. 374, 188 P.3d 1013): *State v. Shepard*, 2010 MT 20, ¶ 9, 355 Mont. 114, 225 P.3d 1217. See also, *State v. Morrisey*, 2009 MT 201, ¶ 49, 351 Mont. 144, 214 P.3d 708 ("we will affirm a district court's decision when it reaches the correct result for the wrong reasons"); *Narum v. Liberty Northwest Ins. Corp.,* 2009 MT 127, ¶ 31, 350 Mont. 242, 206 P.3d 964 ("[b]ecause the WCC reached the right result, we affirm its decision even though we do not fully adopt its reasoning") (citing *Wells Fargo Bank v. Talmage*, 2007 MT 45, ¶23, 336 Mont. 125, 152 P.3d 1275).

V. ARGUMENT

SUMMARY OF ARGUMENT

Section 49-2-505(3)(c) and (4) limit the Human Rights Commission's authority to hear appeals from a hearing officer's decision to those filed within 14 days. The HRC followed statutory law as it was required to do by refusing to hear an appeal which did not comply with that deadline. The district court simply held that based on the plain language of the same statute, it had no authority to overturn the Human Rights Commission. Both the HRC and the district court were correct.

All forms of relief sought by BNSF were predicated on its unfounded argument that the HRC could ignore the law and, therefore, did something wrong. However, it did nothing wrong by following the plain statutory language that limited its authority and jurisdiction, and, therefore, there was no relief that could be provided by the district court. For these reasons, the district court correctly dismissed BNSF's petition and enforced the hearing officer's decision which was made final by the same statutory language.

DISCUSSION

Section 49-2-505(4) MCA provides that a party may appeal a decision of the hearing officer by filing an appeal with the Montana Human Rights Commission within fourteen days from issuance of the decision. Section 49-2-505(3)(c), MCA, provides in relevant part as follows:

> "...If the decision is not appealed to the Commission within fourteen days as provided in subsection (4), **the decision becomes final and is not appealable to the district court."** (emphasis added)

BNSF had until September 16, 2009, within which to appeal the Hearing Officer's decision. Rule 6(e) M.R.Civ.P. which allows an additional three days when a party is required to do something within a period of time after service of a

document is not applicable because § 42-2-505(4) MCA does not mention service. It simply refers to the date on which notice of the decision is issued. See *Flynn v. Uninsured Employers Fund*, 2005 Mt 269, ¶ 17, 239 Mont. 122, 122 P.3d 1216.

BNSF's notice of appeal was not even dated until September 22, 2009, six days after it was due. Therefore, on October 5, 2009, the Department concluded the appeal was untimely and dismissed it. The Department's Order of Dismissal is attached hereto as App. 5. The foregoing facts, which are all the facts necessary to decide this appeal, were established by BNSF's petition.

For the following reasons, the deadline for filing an appeal to the Human Rights Commission is jurisdictional and BNSF's untimely appeal was properly dismissed.

Miller v. Eighteenth Judicial Dist. Ct., 2007 MT 149, 337 Mont. 488, 162 P.3d 121 is dispositive and required dismissal of the railroad's petition. Justice Nelson's concurring opinion in *State v. Clark*, 2008 MT 317 ¶¶ 19-32, 346 Mont. 80, 193 P.2d 934 elaborates on the rule articulated in *Miller*.

In *Miller*, a prosecutor did not comply with Standard I.1.A of the Supreme Court's Standards For Competency Of Counsel For Indigent Persons In Death Penalty Cases which requires notice to the defendant within sixty days after arraignment of the state's intent to seek the death penalty. The district court excused the failure to comply because no prejudice to the defendant had been

shown. The court agreed with the defendant that because there was no language in the standard which required that prejudice be shown or allowed for a good cause exception to an untimely notice, rules of statutory construction did not permit the district court to add those provisions. It stated in language which controls in this case, (even accepting the railroad's premise that the fourteen day time limit which applies in this case is not jurisdictional), that:

> "By the expressed terms of this rule, the prosecutor 'shall' – as opposed to 'may' or 'should' – file notice stating whether he or she intends to seek the death penalty upon a conviction within sixty days after the defendant's arraignment. In other words, the notice and timing requirements are mandatory, not discretionary or permissive. (citations omitted.) Most importantly, nothing in the plain language of the rule suggests that lack of prejudice to the defendant or the defendant's knowledge that the case is a potential death penalty case can supplant the express requirement that the notice be filed within the sixty-day timeframe." *Miller*, ¶ 39.

Likewise, in this case, § 49-2-505(3)(c) MCA, is mandatory, not permissive. It simply states: "If the decision is not appealed to the Commission within fourteen days as provided in subsection (4), **the decision becomes final and is not appealable to the district court."** (emphasis added)

The court's opinion then went on to distinguish between "categorical time prescriptions" which are "inflexible" or "rigid" – but non-jurisdictional, (*Miller*, ¶ 44) and, jurisdictional time periods which relate directly to a court's authority to hear a case and can never be waived or forfeited by the consent of the party. It

held that Standard I.1.A. is necessarily a categorical time prescription because only Article VII, Section 4 can establish jurisdiction and the court, cannot by rule, limit its own jurisdiction or the jurisdiction of district courts. *Miller*, ¶¶ 45 – 46. However, it held that even a categorical time prescription assures relief to a defendant who properly raises it. *Miller*, ¶ 46.

In this case, whether the time prescription found in §49-2-505(3)(c) and (4) MCA, is categorical or jurisdictional, the result is the same. If the former, there is no provision in the statute's plain language for waiver based on good cause or lack of prejudice and reliance on the statute was clearly invoked when counsel for BNSF consulted counsel for Cringle, when the Department of Labor asked whether Cringle had an objection to a late appeal and when Cringle's formal notice of an objection was sent to the Commission in response to its inquiry.

However, it is also clear that the statute is jurisdictional not merely a categorical time prescription. As observed by the Supreme Court, jurisdiction for the state's district courts is established by Article VII, Section 4 of the Montana Constitution. The only reference to jurisdiction over appeals from administrative agencies is found in subparagraph (2) which provides that "The legislature may provide for direct review by the district court of decisions of administrative agencies." The necessary corollary to that grant of jurisdiction is that the legislature may circumscribe or limit jurisdiction over appeals from administrative

agencies. It has done so by statute in § 49-2-505(3)(c)(4) MCA. It has stated that district court jurisdiction over appeals from Department of Labor decisions regarding human rights does not exist absent a timely appeal to the full Human Rights Commission. It has done so through §2-4-701 MCA which limits judicial review to final decisions and only if all administrative remedies have been exhausted. In this case, all administrative remedies were not exhausted because a timely appeal to the Human Rights Commission was not filed. Furthermore, that made the hearing officer's decision the final agency decision which, pursuant to §49-2-505(3)(c) MCA, the district court had no authority to review.

As the Supreme Court made clear in *Miller*, "Subject-matter jurisdiction, because it involves the court's power to hear the case, can never be forfeited or waived, nor can it be conferred by the consent of a party,..." *Miller*, ¶ 44.

Only the legislature can create jurisdiction in the district court to hear an appeal from a hearing officer's decision or an HRC order. In doing so, it has specifically defined the limits of that jurisdiction. The railroad's appeal was not provided for by the legislature and, therefore, there was no jurisdiction in the district court to entertain the appeal by BNSF.

For the same reasons, the HRC had no authority or jurisdiction to entertain BNSF's appeal.

This Court has likened an agency's "authority" to determine an issue to a court's "jurisdiction." *Brisendine v. Dept. of Commerce*, 253 Mont. 361, 833 P.2d 1019, 1022 (1992) ("[o]ur reasoning is based upon the lack of authority in administrative agencies to determine constitutional issues . . . [s]uch decisions rest within the exclusive jurisdiction of the courts"). In *City of Billings Police Dept. v. Owen*, 2006 MT 16, ¶¶ 13, 15, 29-30, 331 Mont. 10, 127 P.3d 1044, the Court referred to an agency's responsibility to examine its records to determine if they are subject to public disclosure as both the agency's "authority" and "jurisdiction" and did not make any distinction between the two.

In *Confederated Salish & Kootenai Tribes v. Clinch*, 2007 MT 63, ¶ 76, 336 Mont. 302, 158 P.3d 377, the Court stated that "[j]urisdiction involves the fundamental power and authority of a court or an administrative agency to determine and hear a case or issue

In *Udelhoven v. Department of Pub. Health & Human Servs., Child Support Enforcement Div. (In re McGurran)*, 1999 MT 192, ¶¶ 12-13, 295 Mont. 357, 983 P.2d 968, the Court determined that the statutory time deadlines for review of administrative rulings cannot be extended because they are jurisdictional in nature.

In *Molnar v. Mont. PSC*, 2008 MT 49, ¶¶ 7-9, 341 Mont. 420, 177 P.3d 1048, the Court held that a district court's authority to review an agency decision is jurisdictional:

> We have held that only the Legislature may validly provide for judicial review of agency decisions. *Nye v. Dept. of Livestock*, 196 Mont. 222, 226, 639 P.2d 498, 500 (1982). As such, a court's authority to review administrative rulings is constrained by statute. *In re McGurran*, 1999 MT 192, ¶ 12, 295 Mont. 357, 983 P.2d 968. This includes the applicable statutes of limitation governing the time for review. *McGurran*, ¶ 12. Accordingly, we have determined that "filing deadlines for petitions for judicial review are jurisdictional in nature, and the failure to seek judicial review of an administrative ruling within the time prescribed by statute makes such an 'appeal' ineffective for any purpose." *McGurran*, ¶ 12.
>
> . . .
>
> Because the thirty-day time limit to seek review of agency decisions had expired when the complaint was filed, the District Court was without jurisdiction under either statute to entertain the request for judicial review of the 1999 Order. Of course, the District Court possessed general subject matter jurisdiction to review the agency decision, but did not have authority "jurisdictional in nature," *McGurran*, ¶ 12, from the Legislature to entertain a petition for review filed beyond the time limit provided in the governing statutes.

The HRC is a creation of the legislature and the legislature defines its authority. It did so in clear terms in §49-2-505(3)(c) MCA. Because the HRC had no jurisdiction to hear the appeal, the district court could not have erred when it refused to order it to do so. Therefore, it doesn't matter whether the district court's decision was based on its lack of jurisdiction or the HRC's jurisdiction. The result is the same.

As this Court has also made clear, dismissal of BNSF's petition is also required based simply on BNSF's failure to exhaust its administrative remedies. The fact that it failed to exhaust those remedies because of a failure to comply with

a statutory time limit is of no consequence. In *Shoemaker v. Denke*, 319 Mont. 238, 84 P.3d 4 (2002), the appellant from a final agency decision failed to comply with a briefing deadline before the Human Rights Commission and his appeal was therefore dismissed by the Commission. He then filed a petition for judicial review in the district court which was dismissed based on his failure to exhaust his administrative remedies. On appeal to the Supreme Court, the dismissal was affirmed. The court explained that,

> "The well-settled principal undergirding the exhaustion doctrine is that 'no one is entitled to judicial relief for a supposed or a threatened injury until the prescribed administrative remedy has been exhausted' (citations omitted). The purpose of the exhaustion doctrine is to 'allow a governmental entity to make a factual record and to correct its own errors within its specific expertise before a court interferes." (citation omitted) *Shoemaker*, at ¶ 18.

BNSF'S AUTHORITIES

There is no authority that would have allowed either the HRC or the district court to ignore the clear, mandatory time limit on appeals from hearing officer decisions. Authorities cited by the railroad are either cited out of context, distinguishable, or completely inapplicable.

On p. 10 of its brief, BNSF complains that the HRC is not authorized to define its own jurisdiction and on pp. 15-18 that authority for the district court to do so arises from §49-2-505(9) and 2-4-701 MCA. It should first be noted that the HRC did not define its own jurisdiction. The legislature did so and the district

court confirmed that the HRC had correctly recognized the limitations on its jurisdiction when, after listening to BNSF's arguments and reviewing the authorities provided, it concluded on pp. 3-4 of its March 15 Order that the HRC complied with the statutory provisions regarding appeals, and neither exceeded its jurisdiction nor abused its discretion. What more review could be required?

Nor does §49-2-505(9) apply to the facts in this case. It governs the time limit for appeals to the district court from a final agency decision. It provides that "[w}ithin 30 days after the Commission issues a final agency decision under §(5), a party may petition a district court for judicial review of the final agency decision as provided in 2-4-702." §(5) governs the agency's time limit for issuing its final decision affirming, rejecting, or modifying the decision of the hearing officer in whole or in part. §2-4-702 MCA permits a party who has exhausted all administrative remedies to petition a district court for judicial review of a final agency decision within 30 days of the decision.

Here there was no final decision under §(5) because there was no timely appeal. Under these circumstances, the hearing officer's decision issued on September 2, 2009, became the agency's final decision. §49-2-505(3)(c) MCA. When §49-2-505 is read together with §2-4-702, it is clear that judicial review is only available where an aggrieved party files a timely appeal and the agency issues a final decision affirming, rejecting, or modifying the initial agency decision. See

§§49-2-505(4) (party has 14 days to appeal hearing officer's decision to agency); 49-2-505(3)(c) (if decision not appealed within 14 days (as provided in §(4), the decision becomes final and is not appealable to the district court") and 2-4-702 (permitting a party who has exhausted all administrative remedies to petition for judicial review).

BNSF is trying to circumvent the exhaustion requirement by arguing that HRC's dismissal order is the final agency decision. This is contrary to the plain language of §49-2-505(3)(c).

BNSF next relies on §2-4-701 MCA, to argue that it can seek a writ of mandate, writ of review, and/or declaratory judgment as relief from the agency's "procedural" dismissal order. However, §2-4-701 MCA does not support BNSF's petition.

Section 2-4-701 MCA provides that a "preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Here, the hearing officer's decision is now the final agency decision and BNSF had an adequate remedy which was an appeal that it failed to timely file. BNSF is relying on §2-4-701 to circumvent the time limits on its legal remedy. That's clearly not what the statute contemplates.

It doesn't matter whether the district court was being asked to review the

hearing examiner's decision which it was statutorily prohibited from doing or the HRC's order dismissing BNSF's appeal, the result must necessarily be the same. When the legislature made the hearing officer's decision final by the passage of time, neither the HRC nor the district court had authority to review it.

On p. 15 of its brief, BNSF cites Rule 24.9.123(13), A.R.M., out of context to suggest that the HRC order of dismissal is the final agency decision subject to district court review. However, when read in context, it is clear that the subsection referred to assumes that a timely appeal to the HRC was filed. Furthermore, an administrative rule which conflicts with statutory law is not effective. See §2-4-305(6)(a) MCA. The railroad's interpretation would create a conflict between Rule 24.9.123(13), A.R.M., and §49-2-505(3)(c) MCA.

On pp. 18-24 of its brief, BNSF suggests that if misapplication of the Administrative Procedure Act won't get it into court, then the district court should have overturned a correct decision by the HRC through a special writ or by declaratory judgment. There is no explanation how placing the label "declaratory judgment" on the district court's order would change the result. Neither could relief have been provided pursuant to either of the special writs sought by BNSF.

Writ of Review

Pursuant to §27-25-201 MCA, an application for a writ of review "must be made on affidavit by the party beneficially interested." BNSF provided no

affidavit in support of its petition for judicial review.

Nor does a court have jurisdiction to issue a writ of review unless the lower tribunal "has exceeded its jurisdiction" and "there is no appeal or plain, speedy and adequate remedy." *Bridger Canyon Property Owners' Assn. v. Planning and Zoning Commision,* 270 Mont. 160, 165, 890 P.2d 1268, 1271. Since the railroad failed to properly avail itself of the HRC appeal, the district court did not have jurisdiction to entertain the writ request. *C.f. Marcher v. Bonzell*, 2004 MT 294, ¶ 21, 323 Mont. 364, 104 P.3d 436 ("[i]n the instant case, there was a plain, speedy and adequate remedy of appeal from the Justice Court, but Marks failed to pursue it. Accordingly, we hold that the District Court did not have jurisdiction to consider the writ").

Additionally, this Court "will not overturn a district court's denial of a writ unless an abuse of discretion is shown." *State v. Jenkins*, 2006 MT 85, ¶ 6, 332 Mont. 34, 134 P.3d 79. In this case, the district court did not abuse its discretion by effectively denying the writ when it concluded that the HRC correctly followed statutory law by dismissing BNSF's untimely appeal. The HRC could not have exceeded its jurisdiction by correctly recognizing that it had none.

On p. 20 of its brief, BNSF acknowledges that it is the legislature not the HRC that establishes its authority. However, the whole premise for its petition to the district court and its appeal to this court is that the HRC should have ignored

clear legislative limits on its authority in favor of its own discretion to excuse BNSF's mistake. BNSF's own arguments would appear to be at odds.

Writ of Mandate

There is a two-part standard to qualify for the issuance of a writ of mandate. *Beasley v. Flathead County Bd. of Adjustments,* 2009 Mt 120, ¶ 16, 350 Mont. 171, 205 P.3d 812 (citing *Becky v. Butte-Silver Bow Sch. Dist. 1,* 274 Mont. 131, 135, 906 P.2d 193, 195 (1995)). The writ is available where the applicant is entitled to the performance of a clear legal duty by the party against whom the writ is sought. *Beasley*, ¶ 16 (citing §27-26-102(1) MCA; *Smith v. County of Missoula,* 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834). A court must grant a writ of mandate if a clear legal duty exists and no speedy and adequate remedy is available in the ordinary course of law. *Beasley*, ¶ 16 (citing §27-26-102(1), (2) MCA; *Smith*, ¶ 28). However, the clear legal duty must involve a ministerial act. *Beasley,* ¶ 16 (citing *Smith,* ¶ 28).

An act is ministerial "where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Beasley*, ¶ 17 (citing *Smith*, ¶ 28). Where the act to be performed involves the exercise of discretion or judgment, however, it is not deemed merely ministerial. *Beasley*, ¶ 17 (citing *Smith*, ¶ 28). Here, the nature of relief provided by writ of mandate is ruled out by both the fact that the HRC

actually followed clear statutory provisions, and that what the railroad complains about is its refusal to exercise its discretion to ignore those provisions.

Citing *Common Cause v. Argenbright*, 276 Mont. 382, 390, 917 P.2d 425, 430-31 (1996), BNSF argues that a writ of mandate is appropriate to enforce an agency's discretionary act. However, *Common Cause* does not stand for this proposition. The Court in that case issued a mandate because the agency had no discretion to engage in mandatory rulemaking; rather, rulemaking was a clear statutory obligation. *Common Cause*, 276 Mont. at 392 ("[w]e hold that mandamus can lie to compel the Commissioner to conduct rulemaking procedures . . .").

Finally, a writ of mandate cannot be issued to correct or undo a past or completed act. *Beasley v. Flathead County Bd. of Adjustments*, 2009 MT 120, ¶ 15, 350 Mont. 171, 205 P.3d 812 ("[a]n action already done cannot be undone by mandamus, however erroneous it may have been"). The mandate was clearly inapplicable to the relief being sought by BNSF in this case.

Declaratory Judgment

"Declaratory judgment is proper when a justiciable controversy exists, genuine and existing rights are affected by a statute, a judgment of the court can effectively operate on the controversy, and a judicial determination will have the effect of a final judgment upon the rights, status, or legal relations of the real

parties in interest." *McGillivray v. State*, 1999 MT 3, ¶ 8, 293 Mont. 19, 972 P.2d 804 (citing *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 117 (1997)).

Whatever the label placed on the district court's order, a declaratory judgment is clearly what the BNSF received when the district court interpreted §49-2-505(3)(c) MCA to prohibit a late appeal to the HRC and concluded that because the HRC had correctly applied the law, there was nothing the district court could do about it.

On p. 24 of its brief, BNSF criticizes the HRC for determining in the first instance whether it had authority to entertain BNSF's appeal. However, every quasi-judicial agency has to decide in the first instance whether it has authority to act. Otherwise, legislative limitations on an agency's authority would be meaningless. Furthermore, the law pursuant to which the HRC dismissed BNSF's appeal was thoroughly considered by the district court, following which the district court held that it had been correctly applied. No greater judicial review is possible.

Authorities Regarding Effect of Jurisdictional or Categorical Time Limits

On pp. 26-27, BNSF argues that pursuant to this Court's decision in *Miller*, *supra,* §49-2-505(3)(c) MCA was not jurisdictional because it did not delineate a class of cases falling within the adjudicatory authority of the district court and presumably the HRC. However, it couldn't do so in clearer terms. It specifically provides that when its time requirements are not met, the hearing officer decision is **final**. According to the commonly understood meaning of "final", the decision

is non-reviewable and within a class of cases over which neither the HRC nor the district court has authority.

On pp. 27-30 of BNSF's brief, it relies on this Court's decision in *Davis v. State*, 2008 MT 226, 344 Mont. 300, 187 P.3d 654, where the Court held that a different section of the code at issue in that case was not jurisdictional and, although it was categorical, could be extended for equitable reasons based on the party's litigation conduct. However, *Davis* relates to criminal not civil procedures; it does not alter the previously-stated principles; and its facts are entirely distinguishable from the facts in this case.

For one thing, the criminal defendant in *Davis* attempted to comply with the time limit for post-conviction relief but was unable to do so for lack of notice regarding the re-appointment of his counsel. Second, the court acknowledged that "jurisdictional" is the appropriate term for describing limitations based on constitutional grounds of authority (*Davis,* ¶ 15) as exists in this case; and, finally the court concluded that the time limit in that case was not jurisdictional, but was "a rigid, categorical time prescription." It did not conclude that the time limit could be ignored for good cause, but that the district court, on remand, should determine whether it had not expired because tolled on equitable grounds. Equitable tolling requires some affirmative act by the party invoking it within the time period sought to be tolled. There are no grounds alleged in this case for

equitable tolling. Mistakes or omissions on the part of the party who misses a time deadline do not justify equitable tolling. See *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725-1726 (1984).

Further, *Davis* reversed *Pena v. State*, 2004 MT 293, 323 Mont. 347, 100 P.3d 154, based upon the Supreme Court's conclusion that it conflicted with an analogous federal law relating to similar criminal proceedings. The United States Supreme Court has stated that it often treats "rule-based time limit[s] for criminal cases differently." See *Bowles v. Russell*, 551 U.S. 205, 212, 214 (2007) ("[t]oday the timely filing of a notice of appeal in a civil case is a jurisdictional requirement").

BNSF relies heavily on *Davis* to support its position that the HRC should have considered whether to modify the time limit to allow its appeal. In *Davis*, this Court remanded to the district court to determine whether the one-year period within which to file a post-conviction relief petition should be equitably tolled. *Davis*, ¶ 25. However, as discussed above, *Davis* did attempt to begin post-conviction proceedings within one year. Moreover, nothing in *Davis* required the one-year time period to be modified. Tolling postpones a time limits operation. The district court was simply required to consider the particular facts of the case to determine whether equitable tolling would be appropriate.

A key difference between *Davis* and the present case is that here the Court is

faced with a final agency decision. BNSF seeks to have the court compel the HRC to hear its appeal after the deadline to file an appeal has passed. There is no suggestion that BNSF did not receive notice, that it was misled, or that its failure to file a timely appeal was anyone else's fault. There is no authority in the statutes for the HRC to review a decision which is deemed final by statute. BNSF's approach requires that the HRC act outside its statutory authority.

On p. 29 of its brief, BNSF argues that the 14-day time period relied on by Cringle, the HRC, and the district court "is not even written in mandatory terms." However, its reference to §49-2-505 is incomplete and ignores subsection (3)(c) which unequivocally provides that if not appealed in a timely fashion, the hearing officer's decision is "final". More mandatory language could not have been used. "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." §1-2-101 MCA. The HRC was not free to pick and choose which parts of §49-2-505 MCA to follow. Nor could the district court.

On pp. 31-33 of its brief, BNSF relies on numerous cases to argue that time limits in administrative proceedings are not jurisdictional, but are time constraints subject to waiver, estoppel, or equitable modification. However, none of those cases address the statute at issue in this case, nor has any conduct by BNSF or anyone else been shown that would justify waiver, estoppel, or equitable

modification.

In *Harrison v. Chance,* 244 Mont. 215, 797 P.2d 200 (1990), the Montana Supreme Court allowed *Harrison* to bring a sexual harassment claim against her employer before the HRC even though the time limit had run. However, *Harrison* had timely filed her case in district court in reliance on *Drinkwalter v. Shipton Supply Co.,* 225 Mont. 380, 732 P.2d 1335 (1987), which had held that the Montana Human Rights Act did not provide the exclusive remedy for sexual harassment cases. *Harrison*, 244 Mont. at 202-203, 797 P.2d at 219. *Drinkwalter* was legislatively overturned by the 1987 enactment of §49-2-509(7) MCA. *Id* at 220.

The court noted that equitable tolling might be appropriate where *Harrison* had, in good faith, pursued her district court case in reliance on the *Drinkwalter* decision. *Id* at 227. *Harrison* was a case of first impression holding that *Drinkwalter* had been legislatively overturned.

`In *Zipes v. TransWorld Airlines, Inc.,* 455 U.S. 385, 102 S.Ct. 1127 (1982), the Supreme Court interpreted specific statutory language granting jurisdiction to federal district courts over Title VII claims and found that timely filing was not a jurisdictional prerequisite. (102 S.Ct. at 1132) The language was entirely different than the statutory language at issue in this case. *Valenzuela v. Kraft, Inc.,* 801 F.2d 1170 (9th Cir. 1986), also cited by BNSF on p. 31 of its brief simply followed *Zipes*

when applying the same statutory language. *Kirkendall v. Dept. of Army*, 479 F.3d 830 (Fed. Cir. 2007) was based by analogy on the same interpretation. Both cases involved grounds for equitable tolling, which as previously shown cannot be demonstrated in this case because no action was taken prior to the expiration of the statute and a statute once expired can no longer be tolled. In fact, in *Valenzuela*, the 9th Circuit cited the following language from *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 104 S.Ct. 1723, (1984) which resolves BNSF's equitable tolling argument:

> "This is not a case in which a claimant has received inadequate notice, see *Gates v. Georgia-Specific Corp.*, 492 F.2d 292 (CA 9 1974); or a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, see *Harris v. Walgreens Distribution Center,* 456 F.2d 588, CA 6 1972); or where the court has led the plaintiff to believe that she had done everything required of her, see *Carlile v. South Route School Dist. RE3-J,* 652 F.2d 981 (CA 10 1981). Nor is this a case where affirmative misconduct on the part of defendant lulled the plaintiff into inaction. (Citations omitted) The simple fact is that *Brown* was told three times what she must do to preserve her claim, and she did not do it. One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."
>
> *Id* at 151, 104 S.Ct. at 1725
>
> *Valenzuela,* 801 F.2d at 1173-1174.

Lozeau v. Geico Indemnity Co., 2009 MT 136, 350 Mont. 320, 207 P.3d 316, cited on p. 31 of BNSF's brief is inapplicable for the same reasons. *Lozeau* allowed equitable tolling of a statute of limitation where a complaint in another

jurisdiction had actually been filed and served on the defendant within the period of time permitted by the three-year statute. In other words, affirmative action was taken prior to the expiration of time for doing so. Under those circumstances, this Court established factors to consider when determining whether the statute was effectively tolled. However, the court in *Lozeau* limited the doctrine of equitable tolling to the situation where "a party reasonably and in good faith pursues one of several possible legal remedies . . . " and meets other criteria within the statutory time limit for doing so. *Lozeau*, ¶ 14. BNSF pursued no remedy with the 14-day time period for filing its appeal.

Nor does Rule 24.9.113(3) ARM, relied on by BNSF on p. 32 of its brief provide support for its argument. By its terms, that rule is inapplicable to time periods fixed by statute. The time period in this case is fixed by statute.

On pp. 33-34 of its brief, BNSF contends that the plain language of §49-2-505(3)(c) which makes the hearing officer's decision final if not timely appealed does not deprive the HRC of jurisdiction. On the contrary, the legislature's intention to do so could not be made clearer. BNSF then makes a quantum leap to argue that the statute doesn't even allow the HRC to dismiss an untimely appeal and in support refers to language in the statute which stresses the manner in which a timely appeal should be dealt with by the Commission. Cherry-picking language from the statute and ignoring other dispositive language in the same statute ignores

basic principles of statutory construction. Section 1-2-102 MCA, provides in relevant part that:

> . . . when a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.

Thus, in statutory interpretation, a court will determine that a specific statutory provision controls over a more general statutory provision. *State v. Brendal*, 2009 MT 236, ¶ 27, 351 Mont. 395, 213 P.3d 448. However, here the provisions are not inconsistent when read in context. The language relied on by BNSF refers to appeals that are timely filed. The language relied on by Chad Cringle pertains to appeals such as BNSF's which are not timely filed.

On pp. 35-36 of its brief, BNSF relies on *Union Pacific R. Co. v. Locomotive Engineers and Trainment Gen. Comm. Of Adjustment,* 2009 WL 4573275, 130 S.Ct. 584, 175 L.Ed 428 (2009), to further support its position that the 14-day time limit is not jurisdictional.

Union Pacific is also distinguishable from the present case. In *Union Pacific,* the National Railroad Adjustment Board (NRAB) dismissed arbitration proceedings between the union and Union Pacific, concluding it lacked jurisdiction because the record did not contain proof that the parties had held a conference to attempt to resolve their dispute. *Union Pacific*, 130 S.Ct. at 594. In reality, the parties had conferenced on least two, if not all five of the disputes. *Id.*

The requirement of a conference was not part of the collective bargaining agreement process, but instead was under the general duties stated in the Railway Labor Act. The Court noted that conferencing is often informal. *Id.* at 597. Where conferencing is disputed, the proceedings can be adjourned to cure any lapse. The rules at issue did not preclude such a solution. *Id.* at 598.

Here, the process for appeal of the hearing officer's decision is not informal. The process for appeal is specifically set forth by statute. Once the time limit for appeal has passed, the decision becomes final and there is no right to appeal. Mont. Code Ann. § 49-2-505(3) and (4). Therefore, the proceedings cannot simply be adjourned to cure BNSF's omission. Moreover, in *Union Pacific*, the prerequisite of conferencing had been met—the record before the NRAB simply did not include evidence of the conferencing.

Nor are *Adkison v. Commissioner of Internal Revenue*, 592 F.3d 1050 (9th Cir. 2010), or *Fleszar v. US Dept. of Labor,* 598 F.3d 912 (7th Cir. 2010), cited on pp. 36 and 37 respectively applicable. *Adkison* was a tax case interpreting an entirely different statute which merely cited the same language from *Union Pacific* upon which BNSF relies.

The language cited from *Fleszar* is dicta. That case involved a discharged employee who complained to the Dept. of Labor that her discharge violated whistleblower-protection law. The DOL declined to investigate because the

employer was not covered by the act. An administrative law judge agreed, as did the administrative review board. The court denied her petition for judicial review because the relief she sought was not available. The court specifically declined to address the issue of whether she filed her administrative complaints and appeals in a timely manner. 598 F.3d at 914.

Likewise, scrutiny of those cases cited in footnote 6 on p. 37 disclose that they add nothing to the previous discussion.

CONCLUSION

For the reasons stated, the time limit for appeal to the Human Rights Commission was jurisdictional. The legislature limits the authority of the agencies it creates as it did in §49-2-505(3)(c) MCA. The constitution limits the authority of courts to review administrative agency's decisions to the terms established by the legislature. Neither the Commission nor the district court had greater authority than provided by statute or the constitution and BNSF's arguments to the contrary would have required that the district court ignore plain statutory language.

For these reasons, the district court correctly applied the law and its judgment should be affirmed.

DATED the 4th day of August, 2010.

By: 
Terry N. Trieweiler

CERTIFICATE OF SERVICE

This is to certify that on the 4th day of August, 2010, a true and exact copy of the foregoing document was sent by U.S. mail, first class, postage pre-paid, addressed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the Appellee's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003, is 9,182 words, including all text, excluding table of contents, table of citations, certificate of service and certificate of compliance.

Dated this 4th day of August, 2010.

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